IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977
No. 77-135

JOHN YARMOSH, NICHOLAS BOTTA and
LAWRENCE MESSINA,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
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NO.

JOHN YARMOSH, NICHOLAS BOTTA,
and LAWRENCE MESSINA, Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT

Petitioners John Yarmosh, Nicholas Botta, and Lawrence Messina pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on June 24, 1977, to the extent it affirmed their convictions.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York denying motions to suppress made on behalf of petitioners on December 20, 1976, is reported as United States v. Esposito, 423 F. Supp. 908 (S.D.N.Y. 1976), and is annexed hereto at p. A-5. The decision of Judge Weinfeld denying Yarmosh's application for leave to move on January 26, 1977, is annexed hereto at p. A-3. No other decisions of the District Court are relevant to this petition.

The opinion of the United States Court of Appeals for the Second Circuit was delivered in open court and is not available as of the date of the filing of this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 24, 1977, affirming petitioners' convictions. p. A-1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(i) and U.S. Sup.Ct. Rule 22(2).

QUESTIONS PRESENTED

(1) Whether the court erred in refusing to permit petitioner Yarmosh to move to suppress as evidence the tape of his intercepted conversation on the grounds that the Government had deliberately failed to give him timely notice of the interception pursuant to 18 U.S.C. §2518(8)(d), and to grant Yarmosh a hearing in connection with the motion, where the motion was made past the cut-off date for motions set

pursuant to F.R. Crim. P. Rule 12(c), but just after the decision in United States v. Donovan, ___U.S.___, 50 L.Ed.2d 661 (1977)?

(2) Whether an application in support of an electronic surveillance order sought in order to investigate illegal gambling operations sufficiently establishes the inadequacy of other investigative techniques, pursuant to 18 U.S.C. § 2518(1)(c), where its allegations of inadequacy substantially consist of statements as to the difficulties of investigating gambling operations in general?

STATUTES INVOLVED

18 U.S.C. § 2518(1)

Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent

jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

...

> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;..."

18 U.S.C. §2518(8)(d)

Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest

of justice, an inventory which shall include notice of --

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

RULE 12 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

(a) Pleadings and Motions. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and nolo contendere. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

(3) Motions to suppress evidence; or

(4) Requests for discovery under rule 16; or

(5) Requests for a severance of charges or defendants under Rule 14.

(c) Motion Date. Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial

motions or requests and, if required, a later date of hearing.

(d) Notice by the Government of the Intention to Use Evidence.

(1) At the Discretion of the Government. At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

(2) At the Request of the Defendant. At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in

its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. A motion made before trial shall be determined before trial unless the court, for good cause, orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. Where factual issues are involved in determining a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time

set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

(g) Records. A verbatim record shall be made of all proceedings at the hearing, including such findings of fact and conclusions of law as are made orally.

(h) Effect of Determination. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be continued in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any Act of

Congress relating to periods of limitations.

STATEMENT OF THE CASE

In an indictment filed in the United States District Court for the Southern District of New York on November 22, 1976, petitioners John Yarmosh, Nicholas Botta, and Lawrence Messina were charged in two counts: (1) conspiracy in violation of 18 U.S.C. § 371; and (2) participation in an illegal gambling business, in violation of 18 U.S.C. § 1955. Petitioners pleaded guilty to the conspiracy count. The substantive count was dismissed on the date of sentencing, March 14, 1977, by consent. Petitioners were each sentenced to serve one year and one day in jail.

Despite their guilty pleas, petitioners had with the consent of the government and the Court reserved their right to appeal from any and all disad-

vantageous pre-trial rulings. These included a ruling denying petitioners' motions to suppress wiretap evidence against them on December 20, 1976; and with respect to petitioner Yarmosh only, a ruling denying his application on January 26, 1977, for leave to move to suppress wiretap evidence against him and for a hearing on the issue of suppression.

Petitioners appealed to the United States Court of Appeals for the Second Circuit from their convictions on the basis, among other things, that the December 20, 1976, ruling had been improper. In addition, Yarmosh appealed on the ground that his January 26, 1977, application had been improperly denied; and from his sentence.

On June 24, 1977, the Second Circuit affirmed the judgment of conviction as to petitioners but remanded Yarmosh for resentencing. As of the

date of this petition, Yarmosh has not been resentenced. Petitioners seek review by this Court of the portion of the judgment of the Second Circuit affirming their convictions.

On July 10, 1975, United States District Court Judge Robert L. Carter signed a federal wiretap order, pursuant to which conversations engaged in by petitioners were allegedly intercepted. Botta's and Messina's conversations were intercepted on July 17, 1975; Yarmosh's on July 13, 1975.

The order was based on affidavits of Special Agent William Bradbury, Jr., of the Federal Bureau of Investigation, which purported to explain the need for the order, as required by 18 U.S.C. §2518(1)(c). The need alleged substantially consisted of the Agent's allegations that electronic surveillance was generally necessary in the investigation

of all gambling operations. The following excerpt from one such affidavit is illustrative:

> "17. I know from my experience and that of other agents that most bookmaking operations dealing in sports and horse race gambling accept bets primarily on the telephone, many times assigning code names for the bettors making the wagers and the bookmakers accepting them. The only required personal contact between the bettor and bookmaker in these instances is when they 'settle up', that is, when they balance their account and any money owed at that time by one or the other is paid. These bets are recorded by the bookmaker accepting them on the telephone on a separate 'sheet' for each runner, who settles with the bettor. In addition, I know that many times the person who 'settles up' with the bettor is not the same person who receives the bet telephonically.
>
> "18. My experience and the experience of other agents have shown that gambling raids and searches of gamblers and their gambling establishments, have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offenses. I have found through my experience and the experience of other special agents who have worked on gambling cases that gamblers frequently do not keep permanent records. If such records

have been maintained, gamblers immediately, prior to or during a physical search, destroy them. Additionally, records that have been seized in the past gambling cases have generally not been sufficient to establish elements of a Federal offense because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activities and nature of the operation.

"19. The informants referred to in this affidavit are unwilling to testify against RICHARD ESPOSITO, ARTHUR SONNENSCHEIN (a/k/a SUNSHINE), ALEX NICHAS (a/k/a ALEX THE GREEK), RITCHIE (LNU), DANNY KRAMER and others as yet unknown, involved in the gambling business, because of fear for their personal safety.

"20. For the reasons enumerated in paragraphs 17-19, all normal avenues of investigation and prosecution have been exhausted or have been considered too risky to attempt."

Yarmosh received formal notice of the interception of his conversation on or about August 6, 1976 -- over one year after the interception -- and some eight months after Yarmosh had been identified in the grand jury. He had been named in neither the order nor the

application for the order.

On January 26, 1977, promptly after the January 18, 1977, decision of the United States Supreme Court in United States v. Donovan, supra, Yarmosh applied for leave to move to suppress his intercepted conversation on the ground that the government had deliberately failed to comply with the notice provisions of 18 U.S.C. § 2518(8)(d); and to obtain a hearing in connection with his motion. The Honorable Edward Weinfeld had set December 21, 1976, as the cut-off date for Yarmosh to move to suppress and for a hearing. Yarmosh's application for leave to move was denied.

REASONS FOR GRANTING THE WRIT

A.

IN DENYING YARMOSH'S APPLICATION FOR A SUPPRESSION HEARING, THE DISTRICT COURT ABUSED ITS DISCRETION UNDER RULE 12(f) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE: THIS COURT'S DECISION IN UNITED STATES V. DONOVAN HAD JUST CREATED NEW LAW AND ENTITLED YARMOSH TO MOVE TO SUPPRESS AFTER THE CUT-OFF DATE SET FOR MOTIONS.

While the district court was empowered pursuant to F.R.Crim.P. 12 to set a cut-off date for motions, it also had discretion pursuant to this Rule to permit petitioner to make a motion after that date. F.R.Crim.P. Rule 12 provides in part:

> "(c) Motion date: Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests . . .
>
> * * *
>
> (f) Effect of Failure to Raise Defense or Objections. Failure by a party to raise defenses or

> objections or to make requests which must be met prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." (Emphasis added)

For instance, where new law develops after the cut-off date, and the motion based on such new law is made promptly after that development, it is an abuse of discretion not to permit the motion to be made. This point was recognized in United States v. Reynolds, 300 F.Supp. 503 (D.D.C. 1969). There, the court refused to permit a defendant to make a pre-trial motion after the cut-off date, noting that defendant was not relying on law created after that date. But it clearly implied that had defendant been relying on a change in the law as the basis for his motion, it would have permitted the motion to be made:

> "The information, both factual and legal, on which the April 28, 1969, motion was based was at all times available to defendants and yet they failed to take appropriate action at the time they filed their first motion to dismiss." Reynolds, supra, 300 F.Supp. at 506 (Emphasis supplied).
>
> "Thus the applicable legal principles were equally 'notorious and available' to defendants [before the cut-off date]." Id.

A contrary rule would be unjust, by penalizing a defendant for failing to move when the law on which his motion was made did not exist at the time his motion had to be made. Applying it here would deprive Yarmosh of substantial rights.

The law in the Second Circuit concerning grounds for suppression for violation of the notice provisions of 18 U.S.C. § 2518(8)(d) was substantially changed by the Donovan decision. Before Donovan, the Second Circuit rule was that suppression could be obtained only if movant could prove he had been

prejudiced by a failure to receive timely notice. This principle was stated as follows in United States v. Rizzo, 492 F.2d 443 (2d Cir. 1974), cert. den. 417 U.S. 944:

> "We believe, as indicated in United States v. Manfredi at [488 F.2d 588,] 601 that the touchstone to the determination whether to suppress wiretap evidence on a claim of failure of notice should be prejudice to the defendant. [Citation omitted]. Here no claim of actual prejudice has been made, nor do we see how it could be, and thus, we find that the district court did not err in admitting evidence of that one telephone call." Rizzo, supra, 492 F.2d at 447. See also United States v. Principie, 531 F.2d 1132, 1141 (2d Cir. 1976).

Since Yarmosh had suffered no actual prejudice from any failure to receive timely notice, any motion to suppress that he would have made prior to Donovan would therefore have been frivolous.

But Donovan created a new basis for suppression of special importance in

cases such as Yarmosh's, where a defendant is only entitled to notice under 18 U.S.C. § 2518 (8)(d) in the discretion of the judge who issued the wiretap order: it imposed a new duty on the government to supply information to the judge to permit him to exercise informed discretion; and implied that violation of this duty, when deliberate, would warrant suppression.

The theory that deliberate violation of the notice provisions of 18 U.S.C. § 2518(8)(d) may be grounds for suppression, stemmed from the following. In refusing to suppress an intercepted conversation although notice of the interception had not been given to two defendants, Donovan focussed on the fact that the government had only inadvertently violated the notice provisions. It strongly implied that inadvertence was a crucial factor in its decision not to suppress:

> "As a result of what the Government labels 'administrative oversight', respondents Merlo and Lauer were not included in either list of names and were never served with inventory notice." Donovan, supra, 50 L.Ed.2d at 663. (Emphasis supplied)

> "Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard." Donovan, supra, 50 L.Ed.2d at 674. (Emphasis supplied)

> "Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional . . ." Donovan, supra, 50 L.Ed.2d at 674 n.26. (Emphasis supplied)

Furthermore, Donovan expressly warned that a deliberate violation of the notice provisions may warrant suppression, stating:

> "We are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties." Donovan, supra, 50 L.Ed.2d at 674-5, n.26.

Also, it cautioned the government to adhere strictly to the notice requirements:

> "[W]e reemphasize the suggestion we made in United States v. Chavez, that 'strict adherence by the Government to the provisions of Title III would nevertheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.' 416 U.S., at 580." Donovan, supra, 45 U.S.L.W. at 4122.

Additionally, Justice Marshall in his partial dissent in Donovan said:

> "The Court's opinion implies that if the violations of Title III [e.g. of 18 U.S.C. § 2518(8)(d)] considered here had been intentional, the result would be different . . . . This must be so, for surely the Court would not tolerate the Government's intentional disregard of duties imposed on it by Congress." Donovan, supra, 50 L.Ed.2d at 682. (Emphasis supplied)

The new duty with which the government must comply where notice is only discretionary is as follows: to submit a complete list of all identifiable persons whose conversations have been intercepted, for the purpose of enabling the judge to exercise an informed discretion:

> "Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518(8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge." Donovan, supra, 50 L.Ed.2d at 670.

This duty - which never existed before Donovan in the Second Circuit - was of extreme importance to persons such as Yarmosh who were only entitled to discretionary notice. Since the government before Donovan had no identifiable duties to perform in connection with such notice, it would have been almost impossible for them to have

committed any violations, let alone deliberate ones, of the notice provisions. But as a result of Donovan, there were new duties imposed on the government with which they arguably failed to comply.

In summary, the Donovan decision created new law which was clearly the kind of good cause for which F.R.Crim.P. 12(f) justified permitting a motion to be made after the cut-off date for motions. The failure of the court to permit Yarmosh's motion to be made despite the creation of such new law warrants the reversal of Yarmosh's conviction and a remand for a hearing.

B.

IN DENYING YARMOSH'S APPLICATION THE DISTRICT COURT MISCONSTRUED THE DECISION OF THIS COURT IN UNITED STATES V. DONOVAN

In his application of January 26, 1977, Yarmosh stressed that the

delay in giving him inventory notice may have resulted from deliberate government conduct:

> "[T]his is a willful or at least a knowing failure by the government . . ." Transcript of Hearing On Application For Leave To Move To Suppress, January 26, 1977, p. 3.

He requested a hearing so that the issue of deliberateness could finally be determined.

The Court in denying the application misconstrued the impact of Donovan on prior Second Circuit law which recognized only prejudice as grounds for suppression. The Court focussed only on the issue of the existence of prejudice:

> "Moreover, on the representation by the Assistant United States Attorney and taking into account the statement made by attorney representing the defendant, there is no possible basis for any claim of prejudice in this case. The case will proceed to trial." (A-4) (Emphasis supplied)

The use of the prejudice standard not only contravened the clear

implications of Donovan, but failed to give defendants such as Yarmosh essential protection against deliberate flouting of the provisions of 18 U.S.C. § 2518(8)(d) by the government. With prejudice as the standard for suppression, the government may effectively ignore its duty to inform the court so long as the defendant cannot meet his heavy burden of proving prejudice.

The Court further missed the implications of Donovan by failing to give Yarmosh a hearing on the issue of deliberateness. Where the issue of deliberateness is raised, the requirement of a hearing must be fairly implied from the Donovan decision, since only through a hearing can the issue of deliberateness be finally determined. A hearing is particularly justifiable where, as here, there was a substantial delay between interception and notification of Yarmosh.

C.

THE DENIAL OF YARMOSH'S APPLICATION BY THE DISTRICT COURT HAS LED TO A CONFLICT BETWEEN THE SECOND AND EIGHTH CIRCUITS ON THE RIGHT TO A HEARING OF A DEFENDANT CLAIMING A DELIBERATE VIOLATION OF THE NOTICE PROVISIONS OF 18 U.S.C. § 2518(8)(d)

Its failure to grant Yarmosh a hearing on the issue of inadvertence places the Second Circuit squarely in conflict with the decision of the Eighth Circuit in the case of United States v. Di Girlomo, 550 F.2d 404 (8th Cir. 1977) on the implications of the Donovan decision.

In DiGirlomo, the government had failed to supply the judge who issued a federal wiretap order with the names of three persons whose conversations had been intercepted. The three were not named in the order or application for the order and so were not entitled to mandatory notice under 18 U.S.C.

§ 2518(8)(d). They received discretionary notice, but only after 90 days after the expiration of the wiretap order: after the period in which notice must generally be given pursuant to 18 U.S.C. § 2518(8)(d).

The three argued that the omission of their names from the list of names given to the judge had been intentional. The court noted that under Donovan, intentional omission might warrant suppression:

> "The Court [in Donovan] indicated that the question of whether suppression would be an available remedy if the government knowingly sought to prevent the district court from serving notice on particular parties was left undecided." Di Girlomo, supra, 550 F.2d at 407.

It held that in "light of the Donovan decision, the appellees are entitled to a hearing on . . . inadvertence . . ." Id. The Court of Appeals for the Second Circuit, on the other hand, has decided this case in

precisely the opposite manner and has created substantial conflict between the two circuits on this important matter.

It is respectfully submitted that the court grant this writ in order to resolve this conflict between the Circuits.

D.

THE DENIAL OF PETITIONERS' MOTION TO SUPPRESS THE WIRETAP EVIDENCE AGAINST THEM ON THE GROUNDS OF THE INSUFFICIENCY OF THE AFFIDAVITS UNDER 18 U.S.C. § 2518(1)(c) HAS EFFECTED A CONFLICT BETWEEN THE CIRCUITS

The allegations in Agent Bradbury's affidavits concerning the uselessness of conventional investigative techniques rested mainly on his conclusions as to the difficulties in investigating gambling operations in general. These allegations were relied on by Judge Weinfeld in his denial of the motion to suppress, as he stated in part:

> "...Agent Bradbury stated that in his experience the records of gambling operations are frequently incomprehensible to the uninitiated and are often destroyed upon the execution of search warrants." United States v. Esposito, supra, 423 F.Supp. at p. 912; p. A-14.

Reliance on such allegations to satisfy the requirements of 18 USC § 2518(1)(c) was plainly rejected by the Ninth Circuit in United States v. Kalustian, 529 F.2d 585 (9th Cir. 1976). There the court stated:

> "They [the investigating officers] discarded alternative means of further investigation because 'knowledge and experience' in investigating other gambling cases convinced them that 'normal investigative procedures' were unlikely to succeed. Agent Brent recites that searches are often fruitless because gamblers keep no records, destroy them, or maintain them in undecipherable codes..."

This affidavit does not enlighten us as to why this gambling case presented any investigative problems which were distinguishable in nature or degree from any other gambling case. In effect the Government's position is that all gambling

> conspiracies are tough to crack, so the Government need show only the probability that illegal gambling is afoot to justify electronic surveillance. Title III does not support that view." Kalustian, supra, 529 F.2d at 589.

The affirmance by the Second Circuit of the petitioners' convictions has caused a conflict between it and the Ninth Circuit as to the kinds of allegations needed to satisfy the requirements of 18 U.S.C. § 2518(1)(c). It is respectfully requested that this Court grant this petition to resolve the conflict between the Circuits.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Dated: July 24, 1977
New York, New York

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of June, one thousand nine hundred and seventy-seven.

Present: HON. WILLIAM H. MULLIGAN
HON. MURRAY I. GURFEIN
HON. ELLSWORTH A. VAN GRAAFEILAND
Circuit Judges,

United States of America, Plaintiff-Appellee	:	
v.	:	
Richard Esposito, Richard	:	77-1147
Rizzo, Nicholas Botta, Lawrence Messina, John Yarmosh,	:	77-1149 77-1184
John Iannone, Irving		77-1185
Albahari, Joseph Falco,	:	77-1227
Nicholas Renna, David		77-1228
Steinberg, Louis Maggio, Defendants,	:	
Nicholas Botta, Lawrence Messina, John Yarmosh,	:	
John Iannone, Irving	:	
Albahari, Joseph Falco,		
David Steinberg, Defendants-Appellants.	:	

Appeal from the United States

District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed as to all defendants-appellants, except remanded for consideration of resentencing as to defendant-appellant John Yarmosh.

A. DANIEL FUSARO
Clerk

by

Arthur Heller
Deputy Clerk

DECISION OF HONORABLE EDWARD WEINFELD ON APPLICATION BY PETITIONER YARMOSH FOR LEAVE TO MOVE TO SUPPRESS WIRETAP EVIDENCE AGAINST HIM ON JANUARY 26, 1977, AT P. 8-9 OF TRANSCRIPT OF HEARING ON APPLICATION

THE COURT: "There really are two matters before the Court now. The first matter and the prime one is whether or not the cut-off date for the motions having been established and the case having been set for trial, motions should be entertained. I set this case for trial, I believe on December 15. Each defendant -- I believe there are seven or more perhaps...is represented by independent counsel. In fact, the Court to avoid a situation of a possible conflict in representation required, the Court recalls it, two defendants to engage counsel other than counsel they have previously retained in order to avoid a conflict.

With so many defendants and so many lawyers, it was, to say the least, difficult to set a date for trial, and finally the date was set, much later than the Court wanted to set it, for February 7, 1977.

I don't recall at this moment when the cut-off date for motions was fixed but it was sometime back. The case has moved forward for trial, is about to go to trial, and the Court denies the application for leave to make a motion.

Moreover, on the representation by the Assistant United States Attorney and taking into account the statement made by attorney representing the defendant, there is no basis for any claim of prejudice in this case. The case will proceed to trial."

UNITED STATES of America

v.

Richard ESPOSITO, a/k/a "Dixon," et al., Defendants.

No. 76 Cr. 1074.

United States District Court, S.D. New York.

Dec. 21, 1976.

OPINION

EDWARD WEINFELD, District Judge.

These eleven defendants are charged in a two-count indictment with conducting an illegal gambling business and conspiring to do so, in violation of Title 18, United States Code, sections 1955 and 371. They have made pretrial motions for severance, to strike alleged surplusage from the indictment, to suppress wiretap evidence, and for a hearing to determine the fairness of pretrial voice identifications.

MOTIONS BY DEFENDANTS IANNONE AND ALBAHARI

Defendants Iannone and Albahari move for a severance of their trial on the grounds that the jury will be unable to consider separately the evidence against each of them if they are tried with the other defendants and that the testimony of codefendants, who could not be called as witnesses in a joint trial, is necessary to establish both Iannone's and Albahari's innocence.

The charges contained in the indictment are not so complex or confusing that the jury will not be able to consider the evidence against each defendant separately. The case does not involve a large number of defendants or numerous counts upon which they will be tried, and it does not present the likelihood of "peripheral" defendants being prejudiced by evidence against codefendants that does not also incriminate them.[1] Under such circumstances, no reason exists to make an exception to the well-established rule that joinder of multiple defendants charged with a single conspiracy will ordinarily be proper.[2]

[3] Iannone and Albahari also move for a severance on the ground that the testimony of their

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1 See United States v. Miley, 513 F.2d 1191, 1209 (2d Cir.), cert. denied, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 62 (1975).

2 See, e.g., United States v. Bernstein, 533 F.2d 775, 789 (2d Cir. 1976); United States v. Miley, 513 F.2d 1191, 1209 (2d Cir.), cert. denied, 423 U.S. 842, 96 S.Ct. 74, 46 L.Ed.2d 63 (1975); United States v. Bynum, 485 F.2d 490, 495-97 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2598, 41 L.Ed.2d 209 (1974); United States v. Melville, 312 F.Supp. 234, 235 (S.D.N.Y. 1970); cf. United States v. Kahaner, 203 F.Supp. 78, 81-82 (S.D.N.Y. 1962).

codefendants, Steinberg and Rizzo, is necessary to establish their innocence. There is no indication that Steinberg and Rizzo, if called at a severed trial would waive their Fifth Amendment rights and testify, nor is there anything to indicate that if they chose to testify their statements would tend to exculpate Iannone and Albahari.[3] Indeed, the court, with the consent of the government, heard defense counsel in camera, and nothing was presented to establish that any testimony of

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3 See United States v. Finkelstein, 526 F.2d 517, 523-25 (2d Cir. 1975), cert. denied, 425 U.S. 960, 96 S.Ct. 1742, 48 L.Ed.2d 205 (1976); United States v. Kahn, 381 F.2d 824, 841 (7th Cir.), cert. denied, 389 U.S. 1015, 88 S.Ct. 591, 19 L.Ed.2d 661 (1967); Gorin v. United States, 313 F.2d 641, 646 (1st Cir.), cert. denied 374 U.S. 829, 83 S.Ct. 1870, 10 L.Ed.2d 1052 (1963); United States v. Pilnick, 267 F.Supp. 791, 800 (S.D.N.Y. 1967); cf. United States v. Marquez, 319 F.Supp. 1016 (1970), aff'd, 449 F.2d 89 (2d Cir. 1971).

Steinberg and Rizzo would be of an exculpatory nature. Further, the movants have not shown the existence of circumstances entitling them to be tried after their codefendants who, even after a separate trial, may be entitled to assert their Fifth Amendment rights when called upon to testify by Iannone and Albahari.[4] Thus, the movants have not established that the testimony of their codefendants could be obtained or that such testimony would be favorable to them; they have not made a showing of sufficient prejudice to warrant a severance.

[4] Defendants Iannone and Albahari also move to strike references to aliases in the indictment. The government has represented, however,

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4 See United States v. Finkelstein, 526 F.2d 517, 524-25 (2d Cir. 1975), cert. denied, 425 U.S. 960, 96 S.Ct. 1742, 48 L.Ed.2d 205 (1976).

that participants in the gambling operations charged in the indictment are repeatedly referred to by these aliases in wiretapped conversations; the aliases will thus be relevant to the case and will constitute part of the government's proof at trial. Moreover, the aliases at issue are not inherently prejudicial. Under the circumstances, inclusion of the aliases in the indictment is proper and, indeed, may well serve to obviate jury confusion.[5]

MOTIONS BY DEFENDANTS BOTTA AND MESSINA

Defendants Botta and Messina,

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5 See United States v. Miller, 381 F.2d 529, 536 (2d Cir. 1967), cert. denied, 392 U.S. 929, 88 S.Ct. 2273, 20 L.Ed.2d 1387 (1968); United States v. White, 386 F.Supp. 882, 885 (E.D. Wis. 1974); United States v. Claytor, 52 F.R.D. 360, 361 (S.D.N.Y.1971); United States v. Addonizio, 313 F.Supp. 486, 491 (D.N.J. 1970), aff'd, 451 F.2d 49 (3d Cir.), cert. denied, 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972).

on behalf of all the defendants, have made an omnibus motion relating to the government's electronic surveillance of telephones which were used by the alleged gambling wirerooms. These wiretaps were conducted under orders issued by Judges Palmieri and Carter of this court on June 11 and July 10, 1975, pursuant to Title 18, United States Code, sections 2516-18.

[5] Defendants attack the applications for wiretaping warrants in several respects. First, they claim that the affidavits in support of the applications did not demonstrate probable cause since they lacked sufficient corroboration of the informants' information. However, the affidavits set forth in detail the underlying circumstances of the informants' observations and the factual basis upon which it was determined that each informant was

reliable, namely their past furnishing of truthful information. In addition, the informants' statements were corroborated both by information from other informants and by the observations of the agents themselves. The persons whom the informants claimed were operating a wireroom with certain phone numbers at certain times of the day were observed by the agents at those times entering and leaving the building where those phones were located. Moreover when the agents placed calls to those phone numbers a person answering to the name "Ritchie," the name of a person whom the informants said was a clerk in the wireroom answered the phone. Taken as a whole these affidavits are more than sufficient to establish probable cause.[6]

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6 See United States v. Harris, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971); Spinelli v. United States, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d

[6] Defendants further contend that the affidavits in support of the applications were insufficient in that they did not set forth

> a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous

as required by 18 U.S.C., section 2518(1)(c). However, the affidavits of Special Agent Bradbury stated in each case the reasons why other investigative procedures were likely to be fruitless. First, although the defen-

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637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); United States v. Tortorello, 342 F.Supp. 1029, 1037 (S.D.N.Y. 1972), aff'd, 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973); United States v. Becker, 334 F.Supp. 546, 549-50 (S.D.N.Y. 1971), aff'd. 461 F.2d 230 (2d Cir. 1972), vacated on other grounds, 417 U.S. 903, 94 S.Ct. 2597, 41 L.Ed.2d 208 (1974).

dants stress that the government had received information from three informants, the fact remains that these informants were unwilling to testify for fear of their lives or personal safety and that without their testimony there was not nearly sufficient evidence to obtain convictions. In addition, none of the informants had access to the inner workings of the conspiracy, since two were merely bettors and one had formerly been a low-level participant in gambling operations. Second, most of the gambling transactions in question occurred over the telephone, making physical surveillance unproductive.[7] Third, Agent Bradbury stated that in his experience the records of gambling

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7 See United States v. Steinberg, 525 F.2d 1126, 1130 (2d Cir. 1975), cert. denied, 425 U.S. 971, 96 S.Ct. 2167, 48 L.Ed.2d 794 (1976).

operations are frequently incomprehensible to the uninitiated and are often destroyed upon the execution of search warrants. Under the circumstances set forth in the affidavits, the requirements of the statute were met.[8]

[7] Defendants claim further that the conversations intercepted during the first wiretap wre sufficient to establish the identity of the persons in charge of the gambling operation and that there was therefore no need for a second wiretap. However the affidavit in support of the application for the second wiretap stated that the first wiretap had not in fact revealed the identity of all persons involved.

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8 United States v. Hinton, 543 F.2d 1002, 1010-1012 (2d Cir. 1976); United States v. Steinberg, supra n.7; United States v. Kerrigan, 514 F.2d 35 (9th Cir.), cert. denied, 423 U.S. 924, 96 S.Ct. 266, 46 L.Ed2d 249 (1975).

For example, the identity of "Ritchie," the wireroom clerk, was still unknown. Thus the second application for a wiretap was properly granted.

[8] The defendants make a further attack on the wiretap order. Seizing upon a single phrase in the applications, they claim that since the government sought authorization to intercept only "wire communications emanating from the above-named premises," the orders, which authorized interceptions of communications to and from the premises, were overbroad. However, a common sense reading of the affidavits and applications as a whole[9] makes it clear that authorization was sought to

9 See United States v. Ventresca, 380 U.S. 102, 108-09, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965); United States v. Tortorello, 480 F.2d 764, 780-81 (2d Cir.), cert. denied, 414 U.S. 866, 94 S.Ct. 63, 38 L.Ed.2d 86 (1973).

intercept calls to and from the premises.

[9] Finally, defendants claim that they are "entitled to an evidentiary hearing to determine the fairness of the identification procedures used to identify them as the voices on the wiretaps." Acceptance of this novel argument would require pretrial hearings as to the admissibility of every piece of evidence which the government plans to use at trial. Identification of a voice on a tape by a person familiar with the speaker is not the same as a lineup in which a victim or witness confronts the defendant, a situation which "is peculiarly riddled with innumerable dangers and variable factors which might seriously, even

10 See United States v. Cafero, 473 F.2d 489, 502 (3d Cir. 1973), cert. denied, 417 U.S. 918, 94 S.Ct. 2622, 41 L.Ed.2d 223 (1974).

crucially, derogate from a fair trial."[11] The vice of a lineup is the possibility of suggestiveness; the defendants have not indicated how the government could have "suggested" to the person making the voice identification the identity of a speaker when the defendants concede that the government did not know who those speakers were. At trial the defendants will have ample opportunity to contest by cross-examination the validity of the voice identifications.[12] There is no need for a hearing now.[13]

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11 United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 1933, 18 L.Ed.2d 1149 (1967).

12 The government has indicated its intention to subpoena voice exemplars from the defendants for use at trial.

13 United States v. Albergo, 539 F.2d 860, 863-64 (2d Cir. 1976), cert. denied, ___ U.S. ___, 97 S.Ct. 529, 50 L.Ed.2d 611 (1976); cf. United States v. Puco, 453 F.2d 539, 544 n.14 (2d Cir. 1971).

[10] Accordingly, the motion by defendants Botta and Messina is denied except with respect to their claims relating to the sealing of the wiretap tapes, as to which an evidentiary hearing is required.